Supreme Court, U.S.
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No. 97-1271

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TENKASI M. VISWANATHAN,
Petitioner,

v.

BOARD OF TRUSTEES OF FAYETTEVILLE
STATE UNIVERSITY, *et al.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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17 pp

QUESTIONS PRESENTED

1. Are the lower courts' rulings consistent with this Court's precedent and relevant state law establishing that Petitioner's claims were barred by the statute of limitations?

2. Were Petitioner's claims are legally insufficent, independent of the operation of the statute of limitations?

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TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Respondents Board of Trustees of Fayetteville State University (FSU) *et al.*, the Honorable Michael F. Easley, Attorney General of North Carolina, and Celia Grasty Jones, Assistant Attorney General, request this Court to deny the PETITION FOR WRIT OF

CERTIORARI filed by petitioner T. M. Viswanathan, which was placed on the docket on February 4, 1998. Petitioner seeks review of the decision of the United States Court of Appeals for the Fourth Circuit, entered on September 19, 1997, which affirmed *per curiam* the April 28, 1997 decision of the United States District Court for the Eastern District of North Carolina granting Respondents' motion to dismiss Petitioner's complaint pursuant to Rule 12(b)(6) and Rule 56 of the Federal Rules of Civil Procedure.

This brief in opposition to the Petition is timely, for pursuant to Rule 30.4 Respondents sought from the Clerk and received an extension of the time allowed to respond, to and including April 2, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, *Viswanathan v. Fayetteville State University Board of Trustees et al.*, 125 F.3d 850 (1997), is unpublished. A copy of the slip opinion is found in Petitioner's Appendix (Pet. App.) at pp. 1-3.

The memorandum opinion of the United States District Court for the Eastern District of North Carolina, Southern Division, *Dr. Tenkasi M. Viswanathan v. The Fayetteville State University Board of Trustees et al.*, 7:96-CV-160-BR(3), April 28, 1997, is unpublished. A

copy of the judgment and order appears in Pet. App. at pp. 3-17.

JURISDICTION

Petitioner seeks jurisdiction of this Court to review the Court of Appeals' decision pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment XIV; 42 U.S.C. §§ 1981 and 1983.

STATEMENT OF THE CASE

The essential facts of this matter are adequately summarized in the District Court's Order (Pet. App. at pp. 5-17).

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I. THE LOWER COURTS CORRECTLY DETERMINED, IN ACCORDANCE WITH THIS COURT'S PRECEDENT AND RELEVANT STATE LAW, THAT PETITIONER'S CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS.

The District Court correctly held, and the Fourth Circuit Court of Appeals correctly affirmed, that Petitioner failed to state viable federal civil rights or state breach of contract claims, for those claims were barred at the time of filing the complaint by the applicable statute of limitations.

As the District Court found, limitations periods for the federal civil rights statutes are borrowed from the statute of limitations operative in the state in which the claim arose. (Pet. App. p. 12, *citing Wilson v. Garcia,* 471 U.S. 261 (1985); *McCausland v. Mason County Board of Education,* 649 F.2d 278 (4th Cir.), *cert. denied,* 454 U.S. 1098 (1981)); *see also* 42 U.S.C. § 1988. In North Carolina, the statute of limitations for an action based "[u]pon a liability created by statute, either state or federal" is three years. N.C. GEN. STAT. § 1-52(2) (1996); *see also* N.C. GEN. STAT. § 1-52(16) (1996) (establishing three-year limitations period for injury actions). The

same limitations period applies to state law contract claims. N.C. GEN. STAT. § 1-52(2).

The District Court properly applied this Court's precedent in holding that the three-year limitations period began to run for Petitioner on February 8, 1990, the date Petitioner -- then employed by Fayetteville State University (FSU) on a one-year term appointment -- received notice that he would not be reappointed to another term of employment, and, therefore, that his employment at FSU would cease when the term under which he was then serving ended on May 15, 1990. (Pet. App. pp. 13-14, *citing Delaware State College v. Ricks*, 449 U.S. 250 (1980) (limitations period began to run when decision not to grant tenure was communicated to professor); *St. Amant v. Benoit,* 806 F.2d 1294, 1298 (5th Cir. 1987) (civil rights claim accrued on date plaintiff received notification of job transfer)). Petitioner's pursuit of a remedy for this decision through FSU's administrative appeals procedure did not toll the limitations period. *Delaware v. Ricks,* 449 U.S. at 258 (filing period was not tolled by professor's grievance of college's tenure decision); *Chardon v. Fernandez,* 454 U.S. 6, 8 (1981) *(per curiam)* (limitations period for filing Section 1983 claims began to run upon termination decision and notification, not when employment was subsequently actually terminated). *See also Wilson v. Crab Orchard Development Co.*, 276 N.C. 198, 214, 171 S.E.2d 873, 884 (1970) (pursuit of another remedy does

not extend time allowed by statute for institution of an action). Accordingly, his time for filing any claim arising from the non-reappointment decision under either the federal civil rights statutes or state law breach of contract expired February 8, 1993. Petitioner did not file the present complaint until October 7, 1996, long after the limitations bar had foreclosed his claims. Moreover, assuming *arguendo* that Petitioner's access to a second reappointment review during the appeal process did toll the limitations period that began running on February 8, 1990, the present complaint would still be untimely. Following that second review, Petitioner had his final notice that FSU would not employ him again by Chancellor Lloyd Hackley's letter to that effect dated August 2, 1993. Even allowing a full three years from that date, Petitioner's October 1996 filing is unquestionably outside the statute of limitations.

As the Court of Appeals affirmed, the District Court correctly applied the legal standards this Court has established for the time limitations and accrual of federal civil rights actions, and correctly applied the governing statute of limitations for breach of contract claims under North Carolina law. Therefore, Respondents submit that this Court, in its discretion, should decline Petitioner's request for review.

II. PLAINTIFF'S CLAIMS ARE LEGALLY INSUFFICIENT, INDEPENDENT OF THE OPERATION OF THE STATUTE OF LIMITATIONS.

By his receipt of the March 1, 1996 order of the United States District Court for the Middle District of North Carolina in his previous federal litigation (1:94 CV 00528), Petitioner indisputably had notice when he filed the present complaint that the legally operative date of notification of his separation from FSU was February 8, 1993. Nevertheless, throughout this litigation Petitioner has continued his disingenuous and so far unsuccessful attempt to convince another federal court that his due process and contract claims are viable because during the administrative appeal of his non-reappointment he obtained an order permitting him to apply again for an appointment. On at least three grounds independent of the operation of the statute of limitations, this effort is patently meritless as a matter of law.

First, as Petitioner himself acknowledged, *he was no longer employed at FSU as of May 15, 1990, the end of his sole contractual term of employment.* (Pet. App. p. 7). *After that date, there was no contract to be either renewed or breached.* The September 16, 1991 recommendation of the Board of Governors of The University of North Carolina that Petitioner be given an opportunity to request another appointment did not

reinstate Petitioner to any form of employment, contractual or otherwise.

Second, even assuming *arguendo* that Petitioner's present complaint was timely, he could still have no legally viable claim under 42 U.S.C. § 1983 for alleged due process violations in his nonreappointment or its appeal, for his one-year term appointment accorded him no constitutionally protected property right in the continuation of his employment. His interest in employment at FSU was created and defined by the terms of a contract that supported "absolutely no possible claim of entitlement to re-employment." *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972). See also *Kilcoyne v. Morgan*, 664 F.2d 940 (4th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982) (it is well-established that faculty members with terminal contracts have no property rights to continued employment that are entitled to due process protection). *Accord Pressman v. UNC-Charlotte*, 78 N.C. App. 296, 302-03, 337 S.E.2d 644, 648-49 (1985), *cert. granted*, 315 N.C. 589, 341 S.E.2d 28 (1986).

The only right Petitioner enjoyed was access to a three-level post-termination appeal process, granted by the FSU Tenure Policies and Regulations for appeals of non-reappointment decisions allegedly based on one or more of three specified impermissible reasons. Because Petitioner had no property right in continued employment,

however, he had neither a *constitutional* entitlement to any sort of appeal hearing nor a legal claim for deprivation of Fourteenth Amendment due process arising from an alleged violation of the procedures established by state law or regulation for the conduct of any hearing he might have been afforded. *Board of Regents v. Roth,* 408 U.S. at 578; *Gryger v. Burke,* 334 U.S. 728, 731 (1948); *Clark v. Link*, 855 F.2d 156, 163 (4th Cir. 1988); *Riccio v. County of Fairfax,* 907 F.2d 1459, 1466 (4th Cir. 1990). The decisions from various states that Petitioner has cited in support of his theory that "contractual rights" were conferred either from the Board of Governors' recommendation or from provisions in the FSU Tenure Policies and Regulations are completely inapposite both to his own employment situation and to the threshold legal requirement for a valid due process claim under Section 1983. *See* Pet. App. p. 26 (citing state court decisions involving limitations on at will employment arising from employee handbooks).

Finally, any claim under 42 U.S.C. § 1981 arising from Petitioner's expired contract with FSU would, even if timely, be dismissable as well. 42 U.S.C. § 1983 is the exclusive federal remedy for the violation of rights guaranteed by 42 U.S.C. § 1981 when the claim is brought against state actors. *Jett v. Dallas Independent School District,* 491 U.S. 701, 735 (1989); *Zombro v. Baltimore City Police Dept.,* 868 F.2d 1364, 1366 (4th

Cir.), *cert. denied,* 493 U.S. 850 (1989). *See also Dennis v. City of Fairfax,* 55 F.3d 151, 156 n.1 (4th Cir. 1995) (clarifying that 1991 amendments to Civil Rights Act, also amending 42 U.S.C. § 1981, did not affect vitality of *Jett*). *But see Federation of African American Contractors v. City of Oakland,* 96 F.3d 1204, 1214 (9th Cir. 1996) (holding that amended Section 1981 contains implied cause of action against state actors). Since Petitioner's Section 1983 claim is barred by the statute of limitations and is, as shown, otherwise legally insufficient, as a matter of law in this Circuit he can have no remedy against Respondents, state actors, pursuant to Section 1981. Moreover, the individual defendants in their individual capacities could not be found liable on any breach of contract claim under state law, for the sole parties to that contract were Petitioner and FSU.

Petitioner has not shown that the District Court and Court of Appeals decisions from which he appeals have decided an important federal question in a way that conflicts with relevant decisions of this Court or with any relevant decision by a state court of last resort. In fact, as Respondents have shown, the decisions appealed from are fully consistent with this Court's precedent pertinent to Petitioner's claims. Therefore, the Petition does not merit this Court's grant of certiorari.

CONCLUSION

For the foregoing reasons, this Court should decline the petition for certiorari.

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April 2, 1998